



## **FEDERAL DEPOSIT INSURANCE CORPORATION**

### **12 CFR Part 363**

#### **RIN 3064-AF63**

### **Applicability of Annual Independent Audits and Reporting Requirements for Fiscal Years Ending in 2021**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Interim final rule and request for comment.

**SUMMARY:** In light of recent disruptions in economic conditions caused by the coronavirus disease 2019 (COVID-19) and strains in U.S. financial markets, some insured depository institutions (IDIs) have experienced increases to their consolidated total assets as a result of large cash inflows resulting from participation in the Paycheck Protection Program (PPP), the Money Market Mutual Fund Liquidity Facility (MMLF), the Paycheck Protection Program Liquidity Facility (PPPLF), and the effects of other government stimulus efforts. Since these inflows may be temporary, but are significant and unpredictable, the FDIC is issuing an interim final rule (IFR) that will allow IDIs to determine the applicability of part 363 of the FDIC's regulations, Annual Independent Audits and Reporting Requirements, for fiscal years ending in 2021 based on the lesser of their consolidated total assets as of December 31, 2019, or consolidated total assets as of the beginning of their fiscal years ending 2021. Notwithstanding any temporary relief provided by this IFR, an IDI would continue to be subject to any otherwise applicable statutory and regulatory audit and reporting requirements. The IFR also reserves the authority to require an IDI to comply with one or more requirements of part 363 if the FDIC determines that asset growth was related to a merger or acquisition.

**DATES:** The interim final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through December 31, 2021, unless extended by the FDIC. Comments on the interim final rule must be received no later than [INSERT DATE 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN 3064-AF63, by any of the following methods:

- *Agency Website:* <https://www.fdic.gov/regulations/laws/federal>. Follow instructions for submitting comments on the Agency website.
- *Email:* Comments@FDIC.gov. Include “RIN 3064-AF63” on the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments/RIN 3064-AF63, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street building (located on F Street) on business days between 7 a.m. and 5 p.m. All comments received must include the agency name (FDIC) and RIN 3064-AF63, and will be posted without change to <https://www.fdic.gov/regulations/laws/federal>, including any personal information provided.

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**SUPPLEMENTARY INFORMATION:**

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- A. Selected Government Responses Related to the Pandemic***

Recent events have significantly and adversely impacted the global economy and financial markets. The spread of COVID-19 has slowed economic activity in many countries, including the United States. Sudden disruptions in financial markets placed increasing liquidity pressure on money market mutual funds (MMFs) and raised the cost of credit for most borrowers. MMFs faced redemption requests from clients with immediate cash needs and potentially the need to sell a significant number of assets to meet these redemption requests, which further increased market pressures. In order to prevent the disruption in the money markets from destabilizing the financial system, on March 18, 2020, the Board of Governors of the Federal Reserve System (Board of Governors), with approval of the Secretary of the Treasury, authorized the Federal Reserve Bank of Boston (FRBB) to establish the MMLF pursuant to section 13(3) of the Federal Reserve Act.<sup>1</sup> Under the MMLF, the FRBB is extending nonrecourse loans to eligible borrowers to purchase assets from MMFs. Assets purchased from MMFs are posted as collateral to the FRBB. Eligible borrowers under the MMLF include IDIs. Eligible collateral under the MMLF includes U.S. Treasuries and fully guaranteed agency securities, securities issued by government-sponsored enterprises, and certain types of commercial paper. The MMLF is scheduled to terminate on December 31, 2020, unless extended by the Board of Governors.<sup>2</sup>

Small businesses also face severe liquidity constraints and a collapse in revenue streams, as millions of Americans were ordered to stay home, severely reducing their ability to engage in normal commerce. Many small businesses were forced to close

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<sup>1</sup> 12 U.S.C. 343(3).

<sup>2</sup> See Federal Reserve Board announces an extension through December 31 of its lending facilities that were scheduled to expire on or around September 30 (<https://www.federalreserve.gov/newsevents/pressreleases/monetary20200728a.htm>).

temporarily or furlough employees. Continued access to financing will be crucial for small businesses to weather economic disruptions caused by COVID-19 and, ultimately, to help restore economic activity.

In recognition of the exigent circumstances facing small businesses, Congress created the PPP as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).<sup>3</sup> PPP loans are fully guaranteed as to principal and accrued interest by the Small Business Administration (SBA), the amount of each being determined at the time the guarantee is exercised. As a general matter, SBA guarantees are backed by the full faith and credit of the U.S. Government. PPP loans also afford borrowers forgiveness up to the principal amount of the PPP loan if the loan proceeds are used for certain eligible expenses. The SBA reimburses PPP lenders for any amount of a PPP loan that is forgiven. PPP lenders are not held liable for any representations made by PPP borrowers in connection with a borrower's request for PPP loan forgiveness.<sup>4</sup> On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (PPP Flexibility Act) was signed into law, amending key provisions of the CARES Act, including provisions related to loan maturity, deferral of loan payments, and loan forgiveness.<sup>5</sup> Among other changes, the amendments increase from two to five years the maturity of PPP loans that are

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<sup>3</sup> Pub. L. 116–136 (Mar. 27, 2020).

<sup>4</sup> Under the PPP, eligible borrowers generally include businesses with fewer than 500 employees or that are otherwise considered by the SBA to be small, including individuals operating sole proprietorships or acting as independent contractors, certain franchisees, nonprofit corporations, veterans' organizations, and Tribal businesses. The loan amount under the PPP would be limited to the lesser of \$10 million and 250 percent of a borrower's average monthly payroll costs. For more information on the Paycheck Protection Program, *see* <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program-ppp>.

<sup>5</sup> Pub. L. 116–142 (June 5, 2020). The SBA subsequently issued an interim final rule revising the SBA's interim final rule implementing sections 1102 and 1106 of the CARES Act temporarily adding the Paycheck Protection Program to the SBA's 7(a) Loan Program published on April 15, 2020. *See* 85 FR 20811 (Apr. 15, 2020) and 85 FR 36308 (June 16, 2020).

approved by the SBA on or after June 5, 2020, and provide greater flexibility for borrowers to qualify for loan forgiveness.

In order to provide liquidity to small business lenders and the broader credit markets, and to help stabilize the financial system, on April 8, 2020, the Board of Governors, with approval of the Secretary of the Treasury, authorized each of the Federal Reserve Banks to extend credit under the PPPLF pursuant to Section 13(3) of the Federal Reserve Act.<sup>6</sup> Under the PPPLF, the Federal Reserve Banks are extending nonrecourse loans to institutions that are eligible to make PPP loans, including IDIs. Under the PPPLF, only PPP loans that are guaranteed by the SBA with respect to both principal and interest and that are originated by an eligible institution may be pledged as collateral to the Federal Reserve Banks (loans pledged to the PPPLF). The maturity date of the extension of credit under the PPPLF<sup>7</sup> equals the maturity date of the PPP loans pledged to secure the extension of credit.<sup>8</sup> No new extensions of credit will be made under the PPPLF after December 31, 2020, unless extended by the Board of Governors and the Department of the Treasury.

The FDIC, Board of Governors, and Comptroller of the Currency adopted interim final rules on March 23, 2020, and April 13, 2020, respectively, to allow banking

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<sup>6</sup> 12 U.S.C. 343(3). On April 30, 2020, the facility was renamed the Paycheck Protection Program Liquidity Facility, from Paycheck Protection Program Lending Facility. *See* Periodic Report: Update on Outstanding Lending Facilities Authorized by the Board under Section 13(3) of the Federal Reserve Act May 15, 2020, Board of Governors of the Federal Reserve System (<https://www.federalreserve.gov/publications/files/mlf-msnlf-mself-and-ppplf-5-15-20.pdf>).

<sup>7</sup> The maturity date of the extension of credit under the PPPLF will be accelerated if the underlying PPP loan goes into default and the eligible borrower sells the PPP Loan to the SBA to realize the SBA guarantee. The maturity date of the extension of credit under the PPPLF also will be accelerated to the extent of any PPP loan forgiveness reimbursement received by the eligible borrower from the SBA.

<sup>8</sup> Under the SBA's interim final rule, a lender may request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of the covered period. *See* Interim Final Rule "Business Loan Program Temporary Changes; Paycheck Protection Program," 85 FR 20811, 20816 (Apr. 15, 2020) and 85 FR 36308 (June 16, 2020).

organizations to neutralize the regulatory capital effects of purchasing assets under the MMLF program and loans pledged to the PPPLF.<sup>9</sup> Consistent with Section 1102 of the CARES Act, the April 2020 interim final rule also required banking organizations to apply a zero percent risk weight to PPP loans originated by the banking organization under the PPP for purposes of the banking organization's risk-based capital requirements. On June 26, 2020, the FDIC adopted a rule that mitigates the deposit insurance assessment effects of participating in the PPP, PPPLF and MMLF.<sup>10</sup> Among other changes, the final rule provides an offset to an IDI's total assessment amount for the increase in its assessment base attributable to participation in the PPP and MMLF. The FDIC remains committed to considering additional, targeted adjustments to mitigate to the greatest extent possible unintended consequences resulting from pandemic-related stimulus actions.

***B. Section 36 of the Federal Deposit Insurance Act (FDI Act) and Part 363 of the FDIC Regulations***

Section 36 of the FDI Act (section 36) was added by the Federal Deposit Insurance Corporation Improvement Act of 1991 and imposes annual audits and reporting requirements on IDIs that meet certain asset thresholds.<sup>11</sup> The purpose of section 36 is to facilitate early identification of needed improvements in financial management at IDIs. Section 36 grants the FDIC discretion to set the asset size threshold for compliance with these statutory requirements, but mandates a minimum threshold of \$150 million in consolidated total assets. Part 363 of the FDIC's regulations implements

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<sup>9</sup> See 85 FR 16232 (Mar. 23, 2020) and 85 FR 20387 (Apr. 13, 2020). These rules were finalized on September 29, 2020. See <https://www.fdic.gov/news/board/2020/2020-09-15-notice-sum-b-fr.pdf>.

<sup>10</sup> See 85 FR 38282 (June 26, 2020).

<sup>11</sup> 12 U.S.C. 1831m.

section 36.<sup>12</sup> Currently, an IDI becomes subject to the annual independent audits and reporting requirements of part 363 with respect to any fiscal year in which its consolidated total assets as of the beginning of such fiscal year are \$500 million or more.<sup>13</sup> Additionally, an IDI with consolidated total assets of \$1 billion or more as of the beginning of any fiscal year must provide management's assessment of, and the independent public accountant's report, on the effectiveness of internal control over financial reporting (ICFR).<sup>14</sup>

Part 363 also includes requirements related to audit committees based on consolidated total assets. More specifically, each IDI with consolidated total assets of \$500 million or more but less than \$1 billion at the beginning of its fiscal year must establish an independent audit committee of its board of directors, the members of which must be outside directors, a majority of whom must be independent of management of the IDI.<sup>15</sup> Each IDI with consolidated total assets of \$1 billion or more at the beginning of its fiscal year must establish an independent audit committee of its board of directors, the members of which must be outside directors who are independent of management of the IDI.<sup>16</sup> Audit committees of IDIs with consolidated total assets of \$3 billion or more as of the beginning of their fiscal year are required to include members with banking or related financial management expertise, have access to their own outside counsel, and not include any large customers of the institution.<sup>17</sup>

The determination of whether an IDI is subject to the annual independent audit

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<sup>12</sup> 12 CFR 363.

<sup>13</sup> 12 CFR 363.1(a).

<sup>14</sup> 12 CFR 363.2(b)(3) and 12 CFR 363.3(b).

<sup>15</sup> 12 CFR 363.5(a)(2).

<sup>16</sup> 12 CFR 363.5(a)(1).

<sup>17</sup> 12 CFR 363.5(b).



and reporting requirements of part 363, including certain additional requirements based on asset size, is based on its consolidated total assets as of the beginning of its fiscal year.<sup>18</sup> For example, an IDI whose fiscal year begins on January 1, 2020, and ends on December 31, 2020, would determine whether it met the base asset threshold for compliance with part 363 as well as the other asset thresholds set forth in part 363 based upon its consolidated total assets of December 31, 2019. As another example, an IDI whose fiscal year begins on July 1, 2020, and ends on June 30, 2021, would determine whether it met the base asset threshold for compliance with part 363 as well as the other asset thresholds set forth in part 363 based upon its consolidated total assets of June 30, 2020.

### ***C. Effects of Government Response Programs on IDI Growth***

Participation in the PPP, PPPLF, or MMLF programs, and effects of other stimulus programs, have caused certain IDIs to experience a temporary increase in their consolidated total assets and thus become subject to part 363 based on certain asset size thresholds set forth within part 363. While some of these IDIs may have reached these thresholds through organic growth or other means, it is likely that others would not have reached these thresholds but for the effects of the government programs and other types of stimulus. For example, an IDI that receives funding under the PPPLF would increase its consolidated total assets (equal to the amount of PPP loans pledged to the Federal Reserve Banks), and increase its liabilities by the same amount. An IDI that obtains additional funding, such as additional deposits or secured borrowings, to make PPP loans

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<sup>18</sup> For measuring total assets, Guideline 1 to part 363 provides that an IDI should use the total assets reported on its most recent Report of Condition (Call Report), the date of which coincides with the end of its preceding fiscal year. If its fiscal year ends on a date other than the end of a calendar quarter, it should use the Call Report for the quarter end immediately preceding the end of its fiscal year.

would increase its total liabilities and consolidated total assets by that amount of funding.<sup>19</sup> Similarly, an IDI that participates in the MMLF would increase its consolidated total assets by the amount of assets purchased from MMFs under the MMLF and increase its liabilities by the same amount. Moreover, some institutions reported general, and likely temporary, increases in deposits due to inflows from PPP proceeds, deposits of funds made in connection with other CARES Act-related programs, and general shifts of liquid funds to safety.

Absent the regulatory relief proposed in this IFR, some IDIs that participate in these programs, or have otherwise been affected by volatility in cash flows related to the pandemic, will be forced to incur additional compliance and related expenses. These expenses include engaging independent auditors, performing assessments of ICFR, reviewing and filing reports, and modifying the makeup of their boards of directors in order to comply with the requirements of part 363.

## **II. The Interim Final Rule**

Under the IFR, the FDIC seeks to negate the cost and burden effects of potentially temporary asset growth associated with pandemic-related programs and similar impacts. The IFR accomplishes this by allowing IDIs to determine the applicability of part 363 of the FDIC's regulations for fiscal years ending in 2021 based on the lesser of the IDI's (a) consolidated total assets as of December 31, 2019, or (b) consolidated total assets as of the beginning of their fiscal years ending in 2021. For example, an IDI with a fiscal year beginning July 1, 2020, and ending June 30, 2021, would normally determine part 363 compliance requirements as of its fiscal year ended June 30, 2020. Under the IFR, an IDI

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<sup>19</sup> An IDI that relies on existing funding, including deposits already at the institution, to make PPP loans would not increase its total liabilities or total assets.

experiencing growth would instead use its consolidated total assets as of December 31, 2019, for purposes of determining its compliance requirements with part 363. In this example, if the IDI's consolidated total assets were less than \$500 million as of December 31, 2019, it would not become subject to part 363 for its fiscal year beginning July 1, 2020 and ending June 30, 2021, even if its total consolidated total assets were \$500 million or more as of June 30, 2020.

Based on consolidated total assets as of December 31, 2019, and June 30, 2020, this proposal would, as further discussed below, potentially apply to approximately 290 IDIs:

- 156 IDIs based on the number of IDIs that had consolidated total assets of \$500 million or more as of December 31, 2019, compared to the number of IDIs that had consolidated total assets of \$500 million or more as of June 30, 2020;
- 107 IDIs based on the number of IDIs that had consolidated total assets of \$1 billion or more as of December 31, 2019, compared to the number of IDIs that had consolidated total assets of \$1 billion or more as of June 30, 2020; and
- 27 IDIs based on the number of IDIs that had consolidated total assets of \$3 billion or more as of December 31, 2019, compared to the number of IDIs that had consolidated total assets of \$3 billion or more as of June 30, 2020.

The FDIC recognizes the benefits of the part 363 requirements and that some IDIs may have experienced organic or other growth that would have resulted in them reaching the thresholds regardless of the impacts of pandemic-related programs and associated effects. However, the FDIC is balancing the risk that some IDIs will not become subject to part 363 requirements based on their consolidated total assets as of their actual fiscal year ends in 2020 with the operational simplicity of “freezing” the date to determine the

applicability of the regulation for all IDIs experiencing growth based on their consolidated total assets as of December 31, 2019. The FDIC has determined that such targeted and time-limited relief from application of the part 363 requirements is necessary and appropriate, in order to ease the compliance and expense burden on such institutions during this crucial period for the financial services industry.

Notwithstanding the temporary relief provided by this IFR, IDIs remain subject to any audit and reporting requirements applicable under other laws and regulations. Also, the FDIC reserves the authority to require an IDI to comply with one or more requirements under part 363 if the FDIC determines that asset growth was related to a merger or acquisition. Additionally, staff notes that approximately 54 percent of IDIs (IDIs with less than \$500 million in consolidated total assets) that are not subject to part 363 have audits performed by independent public accountants.<sup>20</sup>

Sections 36(d) and (f) of the FDI Act obligate the FDIC to consult with the other Federal banking agencies in implementing these provisions of the FDI Act, and the FDIC has performed the required consultation.

### **III. Expected Effects**

Under part 363 of the FDIC's regulations, each IDI with consolidated total assets of \$500 million or more as of the beginning of a fiscal year must, among other things, have its financial statements audited by an independent public accountant, prepare a management report describing certain aspects of its internal control framework and its compliance with laws and regulations, and have an audit committee that oversees the work of the independent public accountant. Part 363 also contains a number of more

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<sup>20</sup> Call Report Data, March 31, 2020. The level of audit work performed on an institution is reported in the March Call Report each year and can be found on line M.1 in the Memorandum to Schedule RC.

detailed and specific requirements that are triggered at asset sizes of \$1 billion and \$3 billion, regarding management reporting, responsibilities of the independent public accountant, and the responsibilities and composition of the audit committee. Part 363 also describes the conditions under which these requirements may be satisfied at the holding company level.

Broadly speaking, by granting temporary relief from the audit and reporting requirements of part 363, the IFR is likely to support participation in the PPP, PPPLF, and MMLF programs by IDIs, which could benefit customers and U.S. economic activity. More specifically, the IFR does this by determining the applicability of the regulation for all IDIs based on the lesser of their (a) consolidated total assets as of December 31, 2019, or (b) consolidated total assets as of the beginning of their fiscal years ending in 2021, in order to ameliorate potential increases in compliance costs for IDIs as a result of their participation in the PPP, PPPLF, and MMLF. Under the IFR, IDIs that cross the \$500 million, \$1 billion, or \$3 billion asset thresholds just described during fiscal years ending in 2021 will avoid the costs of complying with part 363 that they otherwise would have incurred as a result of crossing those thresholds. IDIs that already exceeded those thresholds at year-end 2019, however, must continue to comply with the associated part 363 requirements.

The IFR thus will only affect those entities that cross one or more of the part 363 thresholds after year-end 2019, and while the temporary relief the IFR provides is in effect. It is difficult to estimate how many IDIs will be directly affected by the IFR because the FDIC does not know how many banks with a fiscal year ending after June 30 will increase assets above one of the thresholds in Part 363 between June 30 and the end

of the year. Nonetheless, this rule is expected to relieve IDIs from incurring additional expenses if they experience an increase in consolidated total asset levels that could cause the IDI to become newly subject to certain part 363 requirements.

The following analysis utilizes Consolidated Reports of Condition and Income (Call Report) data to assess changes in consolidated total assets between December 31, 2019, and June 30, 2020, for IDIs in order to identify IDIs that are likely to be directly affected by the IFR. Specifically, the analysis determines whether the change in consolidated total assets for an IDI between December 31, 2019, and June 30, 2020, might entail a change in compliance requirements for part 363 absent the interim final rule, assuming that the asset level at the end of the six-month period is representative of the “beginning of the fiscal year” period criteria for determining applicability of part 363, or its various elements.

The various thresholds included in part 363 and the potential effects of the temporary freeze in IDIs’ total consolidated assets for determining compliance with the regulation’s audit and reporting requirements are examined in the following section.

#### *Threshold for Compliance with Part 363*

Part 363 applies to any IDI with respect to any fiscal year in which its consolidated total assets as of the beginning of such fiscal year are \$500 million or more. As of December 31, 2019, there were 5,177 IDIs, of which 1,453 IDIs were above the part 363 base threshold, which is \$500 million or more in consolidated total assets.<sup>21</sup> As of June 30, 2020, this number had increased to 1,609 IDIs.<sup>22</sup> Therefore, assuming that the asset level as of June 30, 2020, would be representative of the “beginning of the fiscal

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<sup>21</sup> Call Report Data, December 2019.

<sup>22</sup> Call Report Data, June 2020.

year” period criteria for determining applicability of part 363 absent the IFR, 156 institutions would be likely to avoid costs associated with complying with this aspect of the rule.

According to §§ 363.2(b)(3) and 363.3(b), IDIs with consolidated total assets of \$1 billion or more as of the beginning of their fiscal year are required to include an assessment by management of, and a report of the independent public accountant on, the effectiveness of internal control structures and procedures in their part 363 annual report. As of December 31, 2019, 796 IDIs were above the consolidated total asset threshold of \$1 billion or more.<sup>23</sup> As of June 30, 2020, this number had increased to 903 IDIs.<sup>24</sup> Therefore, assuming that the asset level as of June 30, 2020 would be representative of the “beginning of the fiscal year” period criteria for determining the requirements of §§ 363.2(b) and 363.3(b), absent the IFR, 107 institutions would be likely to avoid costs associated with complying with this aspect of the rule.

According to § 363.5(b), IDIs with total assets of more than \$3 billion as of the beginning of their fiscal year are required to have audit committee members with banking or related financial management expertise, who have access to their own outside counsel, and are not large customers of the institution. As of December 31, 2019, 315 IDIs were above the § 363.5(b) consolidated total asset threshold of more than \$3 billion.<sup>25</sup> As of June 30, 2020, this number had increased to 342 IDIs.<sup>26</sup> Therefore, assuming that the asset level as of June 30, 2020, would be representative of the “beginning of the fiscal year” period criteria for determining the audit committee member requirements of §

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<sup>23</sup> Call Report Data, December 2019.

<sup>24</sup> Call Report Data, June 2020.

<sup>25</sup> Call Report Data, December 2019.

<sup>26</sup> Call Report Data, June 2020.

363.5(b), absent the IFR, 27 institutions would be likely to avoid costs associated with complying with this aspect of the rule.

### *Summary*

The IFR would not affect compliance obligations for IDIs that are bound by part 363 as of December 31, 2019. The number of entities that will avoid costs because of the IFR is likely to differ from the numbers suggested by this analysis because consolidated total asset levels are likely to continue to change throughout the remainder of calendar year 2020 and because compliance costs are likely to depend in part on IDIs' eligibility for part 363 compliance at the holding company level.<sup>27</sup> It is difficult to estimate regulatory compliance cost savings as a result of the IFR because such costs depend on the individual characteristics of institutions, the extent of their current audit and reporting activities, and the extent to which they avail themselves of this temporary reduction in compliance requirements, among other things.

Finally, the FDIC believes that the temporary relief provided by the IFR is unlikely to substantively affect the safety and soundness of affected IDIs because it only grants short-term temporary relief and IDIs would continue to be subject to any otherwise applicable statutory and regulatory audit and reporting requirements. The FDIC also maintains a number of other regulatory and supervisory tools to oversee the safety and soundness of IDIs.

## **IV. Alternatives Considered**

The FDIC has considered alternatives to the rule, but believes the IFR represents the most appropriate option for covered institutions. The FDIC considered the status quo

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<sup>27</sup> Regulations regarding the compliance by subsidiaries of holding companies are set forth in 12 CFR 363.1(b).



alternative of maintaining part 363 in its current form, but believes that the challenges for IDIs associated with the COVID-19 pandemic, and costs to comply with the rule for IDIs with temporary asset growth, necessitate targeted and time-limited relief from the application of part 363 requirements. Finally, and as previously discussed, the temporary relief granted to certain IDIs by the IFR, is unlikely to negatively affect the safety and soundness of IDIs. Therefore, the FDIC believes it is appropriate to grant IDIs this temporary relief.

## **V. Administrative Law Matters**

### **A. Administrative Procedure Act**

The FDIC is issuing the interim final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).<sup>28</sup>

Pursuant to section 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an “agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>29</sup> The FDIC believes that the public interest is best served by implementing the interim final rule immediately upon publication in the *Federal Register*.

As discussed above, the spread of COVID-19 has slowed economic activity in many countries, including the United States. Specifically, the disruptions in financial markets have caused depository institutions to receive inflows of deposits—contributing

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<sup>28</sup> 5 U.S.C. 553.

<sup>29</sup> 5 U.S.C. 553(b)(B).

to the increase of deposits at Federal Reserve Banks—and to hold significant amounts of Treasuries. Because the interim final rule will mitigate a potential additional compliance burden and expense for financial institutions participating in Federal government programs intended to ease financial disruptions, the FDIC finds there is good cause consistent with the public interest to issue the rule without advance notice and comment.

The APA also requires a 30-day delayed effective date, except for (1) substantive rules, which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.<sup>30</sup> Because the interim final rule will provide a temporary exemption and relief to affected IDI, the interim final rule is exempt from the APA’s delayed effective date requirement.<sup>31</sup> While the FDIC believes that there is good cause to issue this interim final rule without advance notice and comment and with an immediate effective date, the FDIC is interested in the views of the public and request comment on all aspects of the interim final rule.

## **B. Congressional Review Act**

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a “major” rule.<sup>32</sup> If a rule is deemed a “major rule” by the Office of Management and Budget (OMB), the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.<sup>33</sup> The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or

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<sup>30</sup> 5 U.S.C. 553(d).

<sup>31</sup> 5 U.S.C. 553(d)(1).

<sup>32</sup> 5 U.S.C. 801 *et seq.*

<sup>33</sup> 5 U.S.C. 801(a)(3).

is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.<sup>34</sup> For the same reasons set forth above, the FDIC is adopting the interim final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.<sup>35</sup> In light of current market uncertainty and the need for IDIs to prepare an audit plan in advance of the beginning of their fiscal years, the FDIC believes that delaying the effective date would be contrary to the public interest. As required by the Congressional Review Act, the FDIC will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

### **C. Paperwork Reduction Act**

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the FDIC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC has reviewed this interim final rule and

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<sup>34</sup> 5 U.S.C. 804(2).

<sup>35</sup> 5 U.S.C. 808.

determined that it would not introduce any new or revise any collection of information pursuant to the PRA. Therefore, no submissions will be made to OMB for review.

#### **D. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>36</sup> requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities.<sup>37</sup> The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, consistent with section 553(b)(B) of the APA, the FDIC has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the FDIC is not issuing a notice of proposed rulemaking. Accordingly, the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply. Nevertheless, the FDIC seeks comment on whether, and the extent to which, the interim final rule would affect a significant number of small entities.

#### **E. Riegle Community Development and Regulatory Improvement Act of 1994**

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),<sup>38</sup> in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on IDIs, each Federal banking agency must consider, consistent with the principle of safety and soundness and the public interest, any administrative

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<sup>36</sup> 5 U.S.C. 601 *et seq.*

<sup>37</sup> Under regulations issued by the Small Business Administration, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of \$600 million or less and trust companies with total average annual receipts of \$41.5 million or less. *See* 13 CFR 121.201.

<sup>38</sup> 12 U.S.C. 4802(a).

burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form, with certain exceptions, including for good cause.<sup>39</sup>

For the reasons described above, the FDIC finds that good cause exists under section 302 of RCDRIA to publish this interim final rule with an immediate effective date. As such, the final rule will be effective immediately upon publication in the *Federal Register*. Nevertheless, the FDIC seeks comment on RCDRIA.

#### **F. Use of Plain Language**

Section 722 of the Gramm-Leach Bliley Act<sup>40</sup> requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the interim final rule in a simple and straightforward manner. The FDIC invites comments on whether there are additional steps it could take to make the rule easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could this material be better organized?
- Are the requirements in the regulation clearly stated? If not, how could the regulation be more clearly stated?
- Does the regulation contain language or jargon that is not clear? If so, which

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<sup>39</sup> 12 U.S.C. 4802.

<sup>40</sup> 12 U.S.C. 4809.

language requires clarification?

- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes to the format would make the regulation easier to understand? What else could we do to make the regulation easier to understand?

### **List of Subjects in 12 CFR Part 363**

Accounting, Administrative practice and procedure, Banks, banking, Reporting and recordkeeping requirements.

### **Authority and Issuance**

For the reasons stated in the preamble, the FDIC amends part 363 of chapter 1 of title 12, Code of Federal Regulations, as follows:

### **PART 363—ANNUAL INDEPENDENT AUDITS AND REPORTING REQUIREMENTS**

1. The authority citation for part 363 is revised to read as follows:

**Authority:** 12 U.S.C. 1819, 1831m.

2. Revise § 363.1(a) to read as follows:

#### **363.1 Scope and definitions.**

(a) *Applicability.* (1) This part applies to any insured depository institution with respect to any fiscal year in which its consolidated total assets as of the beginning of such fiscal year are \$500 million or more. Notwithstanding the foregoing and for all requirements in this part, with respect to any fiscal year ending in 2021, an insured depository institution's consolidated total assets shall be determined based on the lesser of (a) an insured depository institution's consolidated total assets as of December 31, 2019, or (b)

an insured depository institution's consolidated total assets as of the beginning of its fiscal year ending in 2021. The requirements specified in this part are in addition to any other statutory and regulatory requirements otherwise applicable to an insured depository institution.

(2) Until December 31, 2021, the FDIC reserves the authority to require an insured depository institution to comply with one or more requirements under this part if the FDIC determines that asset growth was related to a merger or acquisition.

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Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on October 20, 2020.

**James P. Sheesley,**

*Assistant Executive Secretary.*

**BILLING CODE 6714-01-P**

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